

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 24207-2-III

Respondent,

Division Three

v.

RAYMOND HENRY STUART,

UNPUBLISHED OPINION

Appellant.

BROWN, J.—Convicted of unlawful imprisonment and third degree assault, Raymond H. Stuart appeals, contending the trial court erred in failing to instruct the jury on the definition of assault and failing to conduct a same criminal conduct analysis prior to sentencing. We disagree and affirm.

FACTS

On July 22, 2004, an argument allegedly occurred between Mr. Stuart and his Wal-Mart coworker and dating partner, Theresa Matheny. According to Ms. Matheny, Mr. Stuart ordered her into his car in the Richland Wal-Mart parking lot. Then, Mr. Stuart drove her around for about three and one-half hours, even though she

repeatedly asked to be taken home. At one point, Ms. Matheny attempted to leave the car, but Mr. Stuart stepped on the accelerator, causing the door to hit Ms. Matheny's leg. The impact of the car door bruised Ms. Matheny's leg and pushed her back into the car. On July 27, Ms. Matheny reported the incident to the police.

Mr. Stuart was charged with and convicted of unlawful imprisonment and third degree assault. During trial, the court instructed the jury on the elements of third degree assault, but did not define assault. During sentencing, Mr. Stuart did not contest his offender score calculation or argue same criminal conduct. The court ordered concurrent standard range sentences. Mr. Stuart appealed.

ANALYSIS

A. Instructions

The issue is whether the trial court erred in not instructing the jury on the definition of assault. Mr. Stuart contends the court relieved the State of its burden to prove each element of third degree assault by not properly instructing the jury.

Mr. Stuart did not object to the lack of a definition instruction below. The definition of assault is not an element of the crime and therefore must specifically be challenged for error to be preserved. *State v. Daniels*, 87 Wn. App. 149, 156, 940 P.2d 690 (1997). Since Mr. Stuart did not challenge the lack of an instruction, his argument is waived.

Nonetheless, to prove a person is guilty of third degree assault, the State must

prove beyond a reasonable doubt that the person, with criminal negligence, caused bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm. RCW 9A.36.031(1)(d). An “assault” is not actually required to be guilty of third degree assault, unlike first, second and fourth degree assault. See RCW 9A.36.011, .021, and .041. Accordingly, the court was not required to instruct the jury on the definition of assault.

B. Sentencing

The issue is whether the trial court miscalculated Mr. Stuart’s offender score by not finding his unlawful imprisonment and third degree assault convictions encompassed the same criminal conduct. Mr. Stuart contends both convictions encompass the same victim, occurred at the same time and place, and each crime furthered the occurrence of the other.

Mr. Stuart raises this issue for the first time on appeal. In general, illegal or erroneous computations of an offender score may be raised for the first time on appeal, unless the argument involves factual or discretionary determination. *State v. Nitsch*, 100 Wn. App. 512, 520, 997 P.2d 1000 (2000). In *Nitsch*, Mr. Nitsch was convicted of first degree burglary and first degree assault. He argued for the first time on appeal his offender score was miscalculated, raising a same criminal conduct argument. Mr. Nitsch had affirmatively agreed to his offender score and standard range sentences on both counts. The *Nitsch* court held agreement represented a “failure to identify a factual

dispute for the court's resolution and a failure to request an exercise of the court's discretion," which waived the challenge to his offender score. *Id.* at 520. The same situation is presented by Mr. Stuart. The same reasoning applies. We recently applied this reasoning in *State v. McDougall*, 132 Wn. App. 609, 132 P.3d 786 (2006). The trial court exercised its discretion on a factual question.

Even so, the charged crimes do not encompass the same criminal conduct. Multiple current offenses are counted separately for offender score purposes unless the offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Current offenses involve the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). We construe the same criminal conduct requirements narrowly. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Unlawful imprisonment occurs when a person knowingly restrains another person. RCW 9A.40.040(1). Third degree assault, on the other hand, occurs when an individual acts with criminal negligence. RCW 9A.36.031(1)(d). While both of Mr. Stuart's convictions entail the same victim, place and time, his intent changed from one crime to the next. He knowingly imprisoned Ms. Matheny and then with criminal negligence assaulted her with the car door. These crimes do not encompass the same criminal conduct. The trial court properly calculated Mr. Stuart's offender score.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Schultheis, A.C.J.

Kulik, J.